Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: L-3 Communications Corporation, Ocean Systems Division

File: B-281784.3; B-281784.4

Date: April 26, 1999

John H. Horne, Esq., Steffanie F. Walke, Esq., Carl A. Gebo, Esq., David C. Hammond, Esq., and Mary Baroody Lowe, Esq., Powell, Goldstein, Frazer & Murphy, for the protester.
Thomas L. McGovern III, Esq., Michael F. Mason, Esq., Robert J. Kenney, Jr., Esq., and S. Gregg Kunzi, Esq., Hogan & Hartson; and Bucky P. Mansuy, Esq., for Lockheed Martin Integrated Systems, Inc., the intervenor.
Josie C. Serracin, Esq., Michael Glennon, Esq., Eileen White, Esq., Kelly Swartz, Esq., and Trina Alexander, Esq., Department of the Navy, Naval Sea Systems Command, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's upward adjustment to protester's cost proposal in evaluation for cost realism is sustained where agency improperly relied on an unaudited summary of indirect rate data obtained from the Defense Contract Audit Agency (DCAA) which was rescinded by the protester as unauthorized and invalid shortly after submission to DCAA. Although DCAA failed to notify the contracting agency, prior to award, of the rescission of those rates, agency's use of the rescinded rates nevertheless was improper because the agency made no attempt at verifying their reliability, despite the fact that the rates were unsupported, summary in nature, and not reviewed by DCAA. Further, even after the contracting agency had actual knowledge of the rescission of those rates, it improperly continued to rely on those rates in conducting post-award re-analysis of the protester's indirect rates.

2. Agency's disallowance of protester's proposed uncompensated overtime (UCOT) is unobjectionable where contemporaneous evaluation record adequately documents agency's legitimate concerns regarding the protester's proposal's lack of detail about the firm's successful use of UCOT on prior contracts, and the UCOT proposal's potential adverse effects on employee morale and retention, and contract performance.

DECISION

L-3 Communications Corporation, Ocean Systems Division, protests the award of a contract to Lockheed Martin Integrated Systems, Inc. under request for proposals (RFP) No. N00024-98-R-6207, issued by the Department of the Navy, Naval Sea Systems Command (NAVSEA), for the design and production of Omnibus Towed Array Systems. L-3 contends that the agency improperly adjusted its proposed costs upward in evaluating the firm's proposal for cost realism; specifically, the protester challenges as unreasonable the agency's upward adjustment of L-3's proposed indirect rates on the basis of alleged erroneous and invalid L-3 rate data obtained from the Defense Contract Audit Agency (DCAA), failure to accept L-3's "fixed price" subcontractor costs as proposed, and disallowance of L-3's proposed uncompensated overtime. Additionally, L-3 protests the propriety of the agency's best value determination on the ground that selection of an offeror that submitted the lower-cost, lower technically rated proposal was unreasonable and inconsistent with the RFP's evaluation scheme, which provided that the technical considerations were to be more important than cost.[1]

We sustain the protest in part, and deny it in part.[2]

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[1]L-3 does not challenge the agency's evaluation of the technical proposals.

[2]L-3 also requests reconsideration of our decision, L-3 Communications Corp., B-281784.2, Feb.1, 1999, in which we dismissed, as untimely, several supplemental protest contentions raised by L-3 on January 14, approximately 3 weeks after its receipt of the agency evaluation documents that gave rise to the challenges. As we stated in that decision, our Bid Protest Regulations require protest contentions involving other than solicitation improprieties, to be filed within 10 days of the time the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1998). The protester's request for reconsideration of that decision is denied, since the protester essentially repeats arguments it made previously and expresses disagreement with our decision, but fails to present any error of fact or law that shows reconsideration is warranted in any way. 4 C.F.R. § 21.14; R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274 at 2. The protester's strained allegation that the agency's re-analysis of certain L-3 indirect rates revives its previously dismissed issues regarding other aspects of the cost evaluation of its proposal is unfounded; where a protester initially fails to timely protest issues, subsequent action does not necessarily make them timely. Here, the agency's continued use of previously adjusted labor hours, in its post-award indirect rate re-analysis to determine the L-3 proposal's evaluated costs, without further evaluation of those labor hours, does not now render timely the otherwise untimely protest issues related to the adjustment of the firm's proposed labor hours. See Southwest Eng'g Assocs.; Gutierrez-Palmenberg, Inc., B-276465.6, B-276465.7, July 28, 1997, 97-2 CPD ¶ 31 at 2-3.

BACKGROUND

The solicitation

The RFP, issued on April 16, 1998, contemplated the award of a cost-plus-fixed-fee, level-of-effort engineering services contract, with options for cost-plus-incentive-fee low rate initial production (LRIP) and an ordering provision for fixed-price full rate production of Navy towed systems.[3] Offerors were to base their proposals on four sample tasks considered indicative of the type of work required under the contract. Section M of the RFP set forth the evaluation factors for award, where the technical proposal was "more important" than the cost proposal.[4] RFP § M, ¶ 2.1, at 222. Offerors were advised of the agency's willingness to pay a cost premium for a technically superior proposal offering the best value to the government. RFP § M, ¶ 3.3, at 230.

Sections L and M of the RFP provided instructions regarding the preparation and submission of cost proposals. Offerors were notified that the agency would evaluate proposals for reasonableness and realism. RFP § M, ¶ 2.7.1, at 225. The RFP further notified offerors that the number and mix of labor hours, labor rates, material costs, indirect rates, and subcontractor costs (and any other "likely" performance costs) would be reviewed "in light of data available to the Contracting

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[3]The towed array systems are underwater acoustic sensor systems deployed from submarine and surface ships. These towed array systems are equipped with hydrophones and other electronics contained in hoses that range from 200 to 2500 feet in length, and are up to 3 1/2 inches in diameter. The RFP emphasized the agency's desire for a single source for the towed systems to maximize component and subsystem commonality and included "existing and known future U.S. Navy requirements for towed acoustic sensor systems engineering development and production." RFP § L-3, ¶ 1, at 154-56. It was apparently to reflect the all-inclusive purpose of the procurement that the record refers to the solicitation as the "Omnibus RFP," and the resulting award as the "Omnibus contract."

[4]The RFP provided three technical evaluation factors for award, listed in descending order of importance. The "performance" factor (assigned a weight of 65 percent and described as "significantly more important" than the other two factors) was composed of the following equally weighted subfactors: acoustic performance; telemetry; hydro-mechanical; mechanical; supportability; and risk mitigation. The management factor (assigned a weight of 20 percent) consisted of two subfactors, resources and schedule. The past performance factor was the final and least important technical factor (assigned a weight of 15 percent). Adjectival ratings (with correlating numerical scores) were to be assigned under each technical evaluation subfactor and the past performance factor. RFP § M, ¶¶ 2.0, 2.5, at 221-22, 223.

Officer." Id. at 226. Section L of the RFP advised offerors of the importance of submitting detailed cost proposals--all cost summaries were to include supporting data (e.g., support for proposed engineering labor and overhead, manufacturing labor and overhead, subcontracts (and related overhead), interdivisional transfers, general and administrative expense, and other costs). RFP § L-3, ¶ 3.1.3.3, at 176; ¶ 3.1.3.4-.5, at 177. Specifically, each offeror was required to provide its (and its subcontractors') pricing, and supporting data, by government fiscal year (1998 through 2002), which was to include "base amounts, units of measure, rates, and costs for each year." RFP § L-3, ¶ 3.1.2.1, at 169.

The RFP provided that the supporting cost data were required to facilitate an agency estimate of the "likely costs of performance should the Offeror receive the award." RFP § L-3, ¶ 3.1.3, at 172. For instance, proposed management reductions were to be supported by an explanation of the offeror's plan for achieving the projected savings, including the proposal of new cost allocation rates, with an explanation as to the offeror's commitment to maintain the proposed reductions after award; any rate caps offered were to be analyzed, with an assessment of potential risks should actual rates exceed capped rates. RFP § L-3, ¶ 3.1.3, at 173. A 40-hour week was recommended in the RFP--deviations were to be explained and supported--and specific uncompensated overtime disclosure and supporting data requirements were included in the RFP by incorporation of a NAVSEA "requirements concerning work week" clause, discussed in further detail below. RFP § L, at 152, 173-74. The offerors' evaluated costs were to be used for award determination purposes (costs associated with the sample tasks were to be given four times greater weight than, for instance, the separately priced fixed fee and LRIP option items). RFP § M, ¶ 2.7.1, at 226. A cost/technical tradeoff methodology was to be used in determining which proposal offered the best value to the agency for purposes of receiving the contract award. RFP § M, ¶ 3.3, at 230.

Submission of proposals

L-3 and Lockheed submitted the only two proposals received in response to the RFP by the June 8 closing date. Technical proposals were evaluated by the technical evaluation review panel (TERP); cost proposals were reviewed by the cost evaluation panel (CEP). DCAA was requested to review the offerors' and subcontractors' proposed costs and rates, and the DCAA responses (received by NAVSEA by July 20) were considered by the CEP. At that time, DCAA could not recommend indirect rates for L-3, since it was a newly formed company that had not yet submitted a forward pricing rate proposal to DCAA for review for purposes of reaching DCAA-recommended or agreed forward pricing rates for the firm for its government contracts.[5]

[5]L-3, which recently acquired AlliedSignal Ocean Systems, was formed in March 1998.

Discussions were conducted with the offerors regarding numerous aspects of their proposals. In response to the agency's discussion request to L-3 for additional rate information, expressed as a request for information as to when L-3 planned to forward its indirect rate proposal to DCAA, on September 28, L-3 submitted to NAVSEA revised Omnibus cost proposal information (which included various schedules dated September 24 and references to its September 25 forward pricing rate submission), in which the protester significantly lowered its initially proposed Omnibus rates. On September 25, L-3 had submitted a forward pricing rate proposal (which, as discussed below, was submitted in regard to a separate procurement) to DCAA.

L-3's submission to DCAA of its proposed forward pricing rates

There appears to have been some confusion at times during this procurement regarding alleged inconsistencies between the "September 24" and "September 25" L-3 rate submissions. Hearing Transcript (Tr.) at 204, 276-81.[6] For the most part, the record reflects that the alleged inconsistencies are related to the fact that the indirect rates submitted to DCAA (primarily for review in connection with a separate, ongoing TB-23 spare parts contract held by L-3) were calculated without the potential beneficial effects of an award to L-3 of the Omnibus contract under the current RFP. Unlike the submission to DCAA, L-3's rate proposal to NAVSEA under the Omnibus RFP reflected the beneficial effect of the Omnibus award (and associated increased business base) on L-3's proposed indirect rates, and thus included substantially lower indirect rates than the DCAA submission.

The Navy reports that, in conducting a cost realism analysis of L-3's revised proposal, the CEP chairman, on November 10, contacted DCAA for updated rate information on L-3. Tr. at 203. The DCAA auditor reviewing L-3's forward pricing rate proposal told the CEP chairman that he could only recommend rates for fiscal year 1998, but not the out-years, since the DCAA audit was not yet completed. That DCAA auditor told the CEP chairman, however, that L-3 had submitted additional rate data to DCAA on November 6. The DCAA auditor then faxed a summary page of those rates to the CEP chairman on November 13. Agency Report, Feb. 8, 1999, at 5-6, 11; Tr. at 207, 314. Those November 6 indirect rates (which exclude the effects of an Omnibus award) are substantially higher than the protester's proposed rates for the Omnibus procurement.

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[6]Our Office held a hearing on the issue of the propriety of the Navy's reliance on the November 6 rates (discussed below) forwarded by DCAA to NAVSEA in its cost realism evaluation of the L-3 proposal. We received testimony from L-3 personnel, the CEP chairman, and the DCAA auditor who forwarded the November 6 rates to him.

The CEP chairman, who had noted that L-3 had made "multiple rate submissions," decided to rely on the November 6 rate summary as an important factor in the evaluation of L-3's cost proposal for realism, considering that the November 6 summary presented the most recent information available and that it had been submitted by L-3. Tr. at 293.[7] The CEP thereafter relied on the 1-page summary of November 6 rates in its cost realism evaluation of the protester's proposal. Specifically, the CEP chairman averaged the November 6 rates stated on the summary chart for each out-year with the DCAA-recommended rate for 1998 (flat-lined as a baseline for all out-years), to calculate an evaluated rate for L-3 for each out-year. Agency Report, Feb. 8, 1999, at 11-13. Next, to evaluate the L-3 proposal, the CEP compared this "averaged" rate per year to the L-3 final Omnibus proposal and performed its evaluated cost analysis of the proposal based on the higher of the two rates; where L-3 had proposed capped rates (e.g., for [deleted]), the protester's capped rates were used. Where the evaluated cost was higher than capped, the agency expressed its concern about potential cost overruns as a "cost sensitivity" issue (but since L-3 would be responsible for any costs exceeding its capped rates, the potential cost overruns were not added to the total evaluated cost calculated by the CEP for the L-3 proposal).

During this same time period (November and early December 1998), L-3 continued to work with DCAA in an effort to finalize DCAA-recommended forward pricing rates for L-3 to use in negotiating prices with its administrative contracting officer (ACO) on its TB-23 spare parts contract. L-3 has explained that the November 6 rates were submitted to DCAA as one of multiple expected "iterations" in a continuing rate review process.[8] Tr. at 13-17. One week after the summary of L-3

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[7]The Navy reports that, at the time, the CEP reasoned that the November 6 rates were appropriate for use in the cost realism evaluation because they reflected 2 additional months of "rate history" for this newly created company. Agency Report, Feb. 8, 1999, at 12. L-3 and DCAA have confirmed, however, that the November 6 rates were not based on any additional actual rate history from the company other than that which was included in its Omnibus proposal. Tr. at 23, 73, 333.

[8]This iterative process, according to L-3, was to be a continuing data-exchange type of evaluation process, where different adjustments were to be made to its early "officially" proposed rates to reflect what effect a change in certain factors (e.g., head count or depreciation) may have on the proposed rates. L-3 has explained that it considered increases and decreases in these iterative rates part of the review exercise; L-3, however, apparently anticipated that DCAA's final audit findings would support the firm's lower, initial rates as acceptable for negotiation with the ACO for L-3's contract rates. Tr. at 13-17. Conversely, the DCAA auditor testified that he viewed each iteration as a new rate proposal that superseded any prior (continued...)

November 6 rates was forwarded to the CEP chairman by the DCAA auditor, L-3 submitted updated, lower rates to the same DCAA auditor on November 20.[9] DCAA did not inform NAVSEA of these lower rates.

Concerned that recommended rates were still not being finalized with DCAA in a timely manner for the TB-23 spare parts contract, the L-3 employee (L-3's budget manager) who had worked with DCAA on the November 6 and 20 rate iterations discussed the matter with his supervisor, the controller of L-3, who reviewed the November 6 and 20 data submissions, and immediately told the budget manager to notify DCAA that the November 6 and 20 data exchange iterations were unauthorized and invalid. According to the controller, the data were not approved under L-3's formal corporate review procedures for submission of proposed rate revisions, and thus were unauthorized, and were inconsistent with current corporate financial data, and thus invalid.[10] Tr. at 140-41.

At a December 4 meeting, the L-3 controller and budget manager notified DCAA that the November 6 and November 20 data submissions were unauthorized, invalid, and were not revised forward pricing rate baselines; L-3 emphasized to DCAA that only its September forward pricing proposal rates were to be audited. DCAA, which now had a new supervisory auditor assigned to the L-3 forward pricing rate audit, immediately ceased review of the rescinded November 6 and 20 data submissions (which included the same November 6 rates the DCAA auditor had

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[8](...continued)
submission, and thus, once he received the L-3 November 6 data, he ceased review of the initial September rates; consequently, when he subsequently received November 20 data from L-3, he ceased his review of the November 6 rates. Tr. at 310.

[9]L-3 has explained, however, that although some updates were made in this November 20 data, a significant error, not noticed by L-3 or DCAA prior to the November 20 submission, remained in that submission (as it had in the November 6 submission); specifically, L-3 contends that its direct labor base was substantially understated, resulting in an erroneous increase in rates. While the agency points out that L-3 did not identify this alleged error until after award, we see no reason for L-3, which had advised the only government agency it had shared the data with that the data were rescinded, to have pursued the matter until it learned, after award, that the Navy had relied on those data.

[10]We use the term "submission" in this decision, as we did in the hearing, Tr. at 218, to refer generally to the transfer of information from one source (L-3) to the recipient (DCAA), without indicating that the submission is a formal or official rate proposal.

forwarded to the CEP chairman). DCAA instead commenced its audit of L-3's (lower) September forward pricing rate proposal. DCAA did not notify NAVSEA at that time that L-3 had rescinded the November 6 and 20 rates. The CEP chairman testified that he first learned on December 30 about L-3's December 4 rescission of the November 6 rates he had used to adjust the L-3 proposed rates substantially upward. Tr. at 214. He also reported that he did not learn of the November 20 data submission, Tr. at 223, or L-3's claim of a significant error in the November 6 rate data, until after L-3 filed its protest with our Office. Agency Report, Mar. 3, 1999, at 6.

L-3 reports that DCAA completed its review of L-3's September forward pricing rate proposal on January 7, less than 3 weeks after the award was made to Lockheed, and 1 week prior to the agency's post-protest affirmation of its award to Lockheed (discussed below). L-3 states that in that report, DCAA found L-3's September rates (which were substantially lower than the rescinded November 6 rates, and which correlate to its Omnibus proposal's low rates) acceptable for use in negotiation of L-3's out-year contract rates.

Source selection

By December 16, final technical proposal scores and evaluated costs had been assigned to the two proposals. L-3's proposal, evaluated at $[deleted], received a technical score of [deleted] points (with an adjectival rating of [deleted]; Lockheed's proposal, evaluated at $[deleted], received a technical score of [deleted] points (with an adjectival rating of [deleted]). Agency Report, Feb. 8, 1999, at 6. The contract award review panel (CARP) reviewed the TERP and CEP reports, acknowledged that L-3 submitted the technically superior proposal, but recommended to the source selection authority (SSA) that award be made to Lockheed, as the offeror that submitted the proposal offering the best value to the agency. The CARP reasoned that government management and supervision of Lockheed's contract performance could minimize concerns associated with the cited weaknesses in the Lockheed proposal, so that payment of the cost premium involved in an award to L-3 was not warranted. Memorandum from the Chairman, CARP to the SSA 10 (Dec. 16 1998). The SSA, upon consideration of the CARP recommendation, selected Lockheed for award of the contract. Notice of the award to Lockheed was sent to L-3 on December 18. L-3 received a debriefing on December 22. On December 23, the Navy produced redacted copies of its evaluation reports to L-3. L-3 filed its initial protest with our Office on December 24.[11]

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[11]L-3 filed its first supplemental protest on January 14, 1999, and its second supplemental protest on February 18; the protester also raised additional arguments in its March 10 comments responding to the agency's March 3 supplemental report. We have closely reviewed all of the protester's numerous protest contentions raised (continued...)

Post-protest CEP re-analysis of L-3 indirect rates for Omnibus effect adjustment

Immediately after L-3's December 22 debriefing, L-3 notified NAVSEA that the CEP's significant upward adjustment to the protester's proposed September rates was improper, not only for failing to adequately consider substantial rate reductions proposed by L-3, resulting from L-3's on-going management cost reduction efforts, but for improperly failing to take into account the anticipated beneficial effects of the Omnibus award on L-3's indirect rates for the out-years, as indicated in L-3's Omnibus proposal. The matter was also timely protested to our Office.[12] Subsequent to award and the debriefing challenge lodged by L-3 on the matter, the CEP conceded that it erroneously failed to evaluate the L-3 Omnibus proposal for the out-years based upon the potential beneficial effect of a substantial increase in business base if L-3 were awarded the Omnibus contract.

In a post-award, post-protest re-analysis of L-3's indirect rates to correct this error, the CEP calculated an adjustment factor (derived from the CEP's comparison of the L-3 proposal's indirect rates excluding Omnibus to the firm's proposed indirect rates with Omnibus), which it then applied to the rates used by the CEP for L-3 in its pre-award evaluation of the proposal. The CEP concluded that the evaluated cost of the L-3 proposal, prior to award to Lockheed, had indeed been erroneously overstated by approximately $[deleted]. The CEP also reconsidered its "cost sensitivity" concern about L-3's potential cost overruns, associated with the use of L-3's proposed capped rates, and concluded that the CEP had erroneously earlier evaluated that overrun to be approximately $[deleted]; upon re-analysis, the overrun potential was reduced to $[deleted]. The CEP concluded, however, that although

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[11](...continued)
to date, but we find that each of those issues, except the one sustained in this decision (regarding the evaluation of L-3's indirect rates for cost realism) either lacks factual or legal merit, is untimely, or is rendered academic by our corrective recommendation. This decision responds to the more substantial issues timely raised by the protester.

[12]L-3, in its protest to our Office on December 24, specifically alleged that the agency failed to properly evaluate its forward pricing indirect rate proposal, and in its January 14, 1999 protest, the firm reiterated that the agency should have considered the benefits of the Omnibus award in reducing its indirect rates. Although the agency sought dismissal of this January 14 allegation as untimely, in our decision of February 1, in which we dismissed several other supplemental protest issues as untimely, we specifically found that the Omnibus-effect issue was timely, since it was reasonably encompassed by the original protest of the alleged improper evaluation of the firm's forward pricing indirect rates proposal. L-3 Communications Corp., B-281784.2, Feb. 1, 1999, at 4 n.2.

lessened, the potential overrun continued to be a concern.[13] The only other area reviewed by the CEP in this limited re-analysis was one specifically requested by the SSA, who asked that certain L-3 subcontractor-related costs be reviewed; errors found in that portion of the CEP re-analysis show an additional approximate $[deleted] overstatement in L-3's evaluated cost prior to award. Addendum to the CEP Report, Jan. 12, 1999, at 1-6.

After the re-analysis of the L-3 proposal's indirect rates, the revised evaluated cost for L-3 was determined to be $[deleted]; Lockheed's proposal remained at $[deleted]. The CARP reviewed the amended CEP report describing the recalculations, and again recommended award to Lockheed, stating that the cost premium, although reduced, was not worth paying, for the same reasons stated in the initial CARP report. As it had found before, the CARP believed that Lockheed's proposal's weaknesses could be minimized through government management and supervision of contract performance. Memorandum from the Chairman, CARP to the SSA at 5 (Jan. 14, 1999). The SSA considered the revised CEP and CARP reports, and, noting that the CARP had not changed its recommendation for award, on January 14, affirmed the award selection.

PROTEST CONTENTIONS

Evaluation of L-3's indirect rates

L-3 initially protests the agency's evaluation of its indirect rates.[14] Specifically, the protester challenges the agency's reliance on the November 6 summary of rates forwarded to the CEP chairman by DCAA, without supporting data or a DCAA recommendation for use in the agency's evaluation. Tr. at 144. L-3 contends that the agency's reliance on the rescinded November 6 rates was unreasonable and improper, and that it was prejudiced thereby, since the alleged error in the

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[13]This overrun was always cited by the agency only as a cost sensitivity issue, rather than as a basis for adjustment in L-3's evaluated cost; it did not affect the L-3 proposal's total evaluated cost either prior to award or during the post-award re-analysis.

[14]L-3 also generally contends that the agency failed to properly evaluate the firm's proposed risk reduction efforts and its capped rates. The record shows, however, that the agency reasonably did evaluate, and credit, the L-3 proposal for these initiatives. For instance, although the agency found that many of the proposed risk reduction efforts would not be required after award of the contract, the agency gave the protester an approximate $[deleted] credit for the balance of the proposed efforts, lowering L-3's total evaluated costs, and the agency accepted the offeror's capped rates. The protester has not shown why these aspects of its proposal's evaluation are not reasonable.

underlying rate data for those rates would have a widespread effect on other figures included in the rate data schedules. Tr. at 43, 129. L-3 contends that the agency instead should have accepted, as adequately supported, the significantly lower rates contained in its responses to discussion questions. These reduced rates were presented as projections by L-3 for the out-years of the contract, based upon its anticipated cost savings from its recent implementation of substantial management reorganization and cost reduction efforts, as described in its discussion responses.

When an agency evaluates proposals for the award of a cost-reimbursement contract, an offeror's proposed estimated cost of contract performance is not controlling, since it is only an estimate and may not provide a valid indication of the final actual cost the government will be required to pay. See Federal Acquisition Regulation (FAR) § 15.305(a)(1); General Research Corp., B-241569, Feb. 19, 19991, 91-1 CPD ¶ 183 at 5. Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. FAR § 15.404-1(d)(2); ManTech Envtl. Tech., Inc., B-271002 et al., June 3, 1996, 96-1 CPD ¶ 272 at 8. Because the contracting agency is in the best position to make this cost realism determination, our review is limited to determining whether the agency's cost realism analysis is reasonably based and not arbitrary. Grey Adver., Inc., B-184825, May 14, 1976, 76-1 CPD ¶ 325 at 17-18, 27-28. Although an agency may ordinarily rely upon DCAA in performing a cost realism analysis rather than perform all aspects of the evaluation itself, NKF Eng'g, Inc.; Stanley Assocs., B-232143, B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497 at 7-8, this does not mean that the agency is thereby insulated from responsibility for error on the part of DCAA, or error in audit advice or information, even where, at the time, the agency is unaware that information it is given by DCAA is incorrect. Where the agency's judgment in conducting its cost realism evaluation is founded upon incorrect information, it will not be deemed reasonable. American Management Sys., Inc.; Department of the Army--Recon., B-241569.2, B-241569.3, May 21, 1991, 91-1 CPD ¶ 492 at 7-8.

Based on the record here, including testimony at the hearing, we find that NAVSEA's cost realism determination regarding L-3's proposed indirect rates was not reasonably based. The agency advances numerous reasons why its reliance on the November 6 rates received from DCAA was reasonable. For instance, the agency states that these rates were the most recent information available, representing at least an additional 2 months of rate history on this newly created company; testimony at the hearing confirmed, however, that the November 6 rates, at best, were rescinded reformulations of earlier submitted data and did not include any actual or historical rate information more recent than that which was submitted by L-3 with its proposed rates in September. Tr. at 23, 73. In fact, if the agency desired recent actual data from current L-3 operations, testimony from the DCAA auditor confirmed the protester's testimony that DCAA did in fact have additional

1998 actual rates for review and consideration, yet that information was not independently reviewed in the cost realism evaluation of L-3's proposed rates for the out-years. Tr. at 72, 116, 300.

Next, the agency contends that unaudited rate checks from DCAA are acceptable in conducting cost realism evaluations where that is the best information available; the CEP's testimony also gives some weight to the fact that the rates came from DCAA, which is a recognized authority on contractor rates. Tr. at 290-91. Although unaudited rate checks may be reasonable for use in evaluations of cost proposals for realism, see Intermetrics, Inc., B-259254.2, Apr. 3, 1995, 95-1 CPD ¶ 215 at 7-8, the reasonableness of the information must be viewed in terms of its reliability--for example, where rate checks provided by DCAA, although not audited, are based on current contract data, the rates are inherently more reliable, in that they are tested, easily confirmed measures of realism. See Radian, Inc., B-256313.2, B-256313.4, June 27, 1994, 94-2 CPD ¶ 104 at 6-7.

Here, however, there was no measure of reliability of the November 6 rates. First, from testimony at the hearing by the DCAA auditor and the CEP chairman, it is clear that no independent audit-type review for accuracy or realism had been performed on these rates for this newly created company. Tr. at 212, 311. Although we appreciate that it was difficult for the CEP, as explained by the agency, to evaluate for realism the proposal submitted by L-3, in light of the minimal data provided, and the lack of historical data for the new company, there is no showing in this record that any independent actual rate data for any relevant, available period were sought by the CEP, either in terms of separate, available DCAA "actuals" data for 1998, or agency records on current L-3 contracts, or otherwise, for evaluation of L-3's proposed out-year rates. We think this is especially significant here, where the RFP required detailed cost data from offerors for the purpose of evaluation of the proposals, and the contracting agency specifically requested detailed supporting data from DCAA in its earlier requests for recommendations, yet used an unexplained, rescinded set of rates (presented only by summary percentages) in calculating the offeror's evaluated costs. Further, there is no indication in the record that DCAA questioned L-3's rescission of the rates--rather, the record demonstrates that DCAA fully accepted L-3's disavowal and immediately ceased its review of those rates. Consequently, the protester here had a reasonable basis to believe the rescinded rates were eliminated from any further consideration.

Given the facts of this case, notably, the protester's rescission of the November 6 rates, we cannot conclude that the DCAA's mere forwarding of a fax of summary rates (prior to their rescission), which DCAA did not review in any way, is an appropriate verification of rates by DCAA for purposes of reliance on those rates by the CEP for a cost realism evaluation of the protester's proposal. Although the record indicates that the agency did not know of the rescission at the time it was conducting its cost evaluations, the record is clear that, once it did have actual

knowledge of the rescission, the agency still did nothing to correct its erroneous use of untested, unsupported, and rescinded data. In fact, the CEP performed its post-award, post-protest re-analysis of L-3's rates using the same rescinded rates, with full knowledge that the source of the information, L-3, had disavowed them.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In this case, calculating the impact of the agency's improper reliance on the higher, November 6 rates is difficult, because of the number of variables: in addition to the complexity of the calculations in this case (with some capped rates, such as for [deleted], and different rates, such as for [deleted]), we cannot be certain what rates the agency would have found reasonable, had it done an adequate indirect rate analysis. It appears, however, that the impact could have been quite substantial: for example, for [deleted], an important element of evaluated costs, the protester's September rates of [deleted] percent (for 1999-2002, respectively) are substantially lower than the [deleted] percent rates in the November 6 data submission.[15] Enclosure 2 to CEP Report, Dec. 14, 1998, at 10. While we cannot calculate precisely the effect on L-3's costs of the disparity in the various rates, the agency does not argue that it could not have had a material effect. Given that L-3 submitted the proposal that the agency found technically superior and the agency selected the awardee only because of the cost differential, any significant change in the protester's proposal's evaluated cost could substantially increase its chances for award. We therefore conclude that L-3 was prejudiced by the agency's use of rates without a reasonable cost realism analysis, and we sustain the protest on this ground.[16]

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[15]Both these September and November rates exclude the effect of the Omnibus contract.

[16]L-3 challenges the adequacy of discussions held with the firm on the matter of indirect rates. The record demonstrates, however, that discussions were meaningful in this area. [deleted]. Clearly, the offeror was led directly to the areas of its proposal where additional information was needed to improve its cost proposal. To the extent the protester asserts that the agency should have conducted another round of discussions if any questions remained based upon new cost information in its discussion responses, the agency had no obligation to conduct another round of discussions, since an offeror assumes the risk that changes in its final offer might raise questions about its ability to meet solicitation requirements. Joint Threat Servs., B-278168, B-278168.2, Jan. 5, 1998, 98-1 CPD ¶ 18 at 10; Signal Corp., B-241849 et al., Feb. 26, 1991, 91-1 CPD ¶ 218 at 5.

Disallowance of L-3's proposed uncompensated overtime

L-3 challenges the agency's determination not to accept its proposal of uncompensated overtime (UCOT). The protester contends that, if its proposed UCOT had been accepted, the savings associated with that UCOT would have substantially lowered its proposal's evaluated cost. L-3 contends that the agency unreasonably concluded that L-3 would suffer too great a financial burden in performing the contract without charge for the [deleted] additional hours per week proposed for certain of its employees. The agency responds that financial risk related to the UCOT proposal was not a significant issue. Rather, the Navy reports, because L-3 would be reinstating a prior UCOT policy, which the protester did not adequately explain, the proposed UCOT may have an adverse effect on the morale and retention of L-3 personnel, and thus on contract performance.

Section L of the RFP included the agency's "requirements concerning work week" clause, requiring offerors to provide specific supporting information when proposing UCOT (personnel hours in excess of 40 hours per week, without additional compensation for such work). That clause, among other things, required the offeror to provide its corporate UCOT policy, information about the adequacy of its accounting system to report UCOT, and an assessment of the productivity of the proposed UCOT effort. RFP § L, at 152. Elsewhere in section L, each offeror was notified that it must discuss its proposed UCOT and company policy on uncompensated time that may affect the program. Id. ¶ 3.1.4, at 180.

In evaluating L-3's proposed [deleted]-hour week for certain employees, the agency determined that insufficient support was provided by L-3 for this proposed UCOT. L-3's newly re-instituted UCOT policy merely provided terms regarding the payment of overtime to certain employees if [deleted] hours were worked per week (i.e., it was a statement of L-3's overtime policy). The agency also was interested in reviewing any L-3 accounting records supporting UCOT performed on other projects. Consequently, during discussions, the protester was asked to substantiate that its previous use of UCOT had been successful; for instance, the protester was asked for a description of its past programs utilizing UCOT, and L-3 was asked to provide copies of its UCOT accounting records to substantiate its claims of successful UCOT use. In response, L-3 only generally described partial UCOT data available for the firm (without describing the nature of the projects that used UCOT), stated that L-3 employees will record all overtime hours in the future, and estimated that certain employees will work an average of [deleted] UCOT hours per week (with a guarantee of [deleted] UCOT hours per week).

The evaluators found that insufficient information had been submitted by L-3 to substantiate the proposed UCOT's promised benefits to the agency. The CEP determined that, without a presentation of adequate support for the proposed UCOT, the effects of the proposed UCOT upon employee retention and morale could not be assessed; the CEP included the proposed UCOT as a "cost sensitivity"

concern in its evaluation report. The CARP reviewed the CEP findings and concluded that although the agency could accept the offeror's UCOT proposal, it would not do so here, in light of the fact that possible personnel retention and morale problems posed a risk to performance of the contract.

An offeror is responsible for affirmatively demonstrating the merits of its proposal, Radian, Inc., supra, at 8. Here, we find that the agency reasonably determined that L-3 failed to submit adequate support for its proposed UCOT (such as a showing of the firm's successful historical use of UCOT or measures that may prevent any adverse effect of the use of the proposed UCOT on productivity) and the agency expressed a legitimate concern regarding the application of the proposed UCOT to the Omnibus contract, in terms of its potential adverse effect on the firm's performance of the contract. The record on this issue thus provides no basis to question the propriety of the agency's determination to disallow the protester's proposed UCOT.[17]

Recommendation

We recommend that the Navy conduct discussions with both offerors regarding any remaining cost proposal concerns (regarding, at a minimum, each offeror's indirect rates), request revised cost proposals, and evaluate those offers for cost realism.[18]

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[17]As to L-3's contention that the Navy improperly adjusted its proposed "fixed-price" subcontractor costs, the record reflects, and the protester concedes, that there were no fixed-price contracts entered into between the protester and its subcontractors. Rather, the subcontractor quotations were based only on the RFP's sample tasks, which are not actual contract performance requirements. The record otherwise shows that the agency's subcontractor cost evaluation considered information from the cognizant DCAA offices, and that L-3 does not challenge, with any level of specificity, the actual bases asserted by the agency in support of its adjustments to L-3's proposed subcontractor costs. In sum, L-3 provides insufficient basis to question the reasonableness of the evaluation of its subcontractor costs. Additionally, although the protester speculates that Lockheed had superior knowledge about the government's requirements under the RFP (e.g., regarding government furnished materials), possibly due to improper communications between Lockheed and the agency, the record shows no evidence to support this allegation.

[18]Given the passage of time since the agency's earlier requests for indirect rate information, and possible changed circumstances for the offerors, we recommend that discussions with L-3 and Lockheed include, for example, requests for more recent supporting data and information in support of the indirect rates they propose. Since the technical evaluation of the proposals was not protested by L-3,

(continued...)

If, after the selection process has concluded, the protester's proposal is determined to offer the greatest value to the government under the terms of the RFP, the Navy should terminate Lockheed's contract, and award to L-3.[19] We also recommend that the protester be reimbursed the reasonable cost of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part and denied in part.

Comptroller General
of the United States

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[18](...continued)
it was not a subject for review by our Office, and thus, is not included in our recommendation.

[19]L-3's protest of the propriety of the agency's tradeoff analysis for award is rendered academic, in light of our recommended corrective action.